

Note

Ohio Choice-of-Law Rules: A Guide to the Labyrinth

I. INTRODUCTION

"Dissatisfaction with the operation of mechanistic choice-of-law rules . . . is certainly not new. But at least in the United States, the time has hardly ever been more opportune for a radical re-evaluation of this most intricate and confused area of the law."¹ This statement about choice of law was made almost two decades ago, and, indeed, many important developments in conflicts law have occurred since that time. The field has been bombarded with new theories. Some have been consistent with one another,² others wholly at odds.³ Some experts have refined their approaches,⁴ others have changed their positions radically.⁵ A pioneering court in this area, the New York Court of Appeals, has embraced the new conflicts thinking,⁶ struggled to apply it,⁷ and finally become so frustrated that it has retreated to old and familiar territory.⁸

Although recent years have brought a flurry of activity in the development of choice of law, it is doubtful that the courts have made great progress toward resolution of the many problems that plague this area of the law. True, the new approaches have made major inroads.⁹ The trend has been to replace the simple, absolute, traditional rules with a more flexible, case-by-case approach. The various jurisdictions still are using many differing theories, how-

1. Baade, *Foreword*, 28 LAW & CONTEMP. PROBS. 673, 673 (1963).

2. See, e.g., Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 213 (1971); Sedler, *Comments in Conflict of Laws Round Table*, 49 TEX. L. REV. 224, 224 (1971).

3. Compare Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966), with Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971). Leflar includes the better rule of law as a consideration in choice of law, while Cavers finds it irrelevant, if not misleading.

4. Compare Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 178, with Currie, *Comments in Babcock v. Jackson*, A Recent Development in Conflict of Laws, 63 COLUM. L. REV. 1212, 1242-43 (1963).

5. Compare Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 192-93 (1933), with Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 213-15 (1971). In the first article the author calls for a flexible approach with the primary goal of promoting justice in the individual case, while in the second he advocates choice-of-law decisions based on a set of specific rules.

6. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

7. See, e.g., *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

8. See, e.g., *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978).

9. See, e.g., *Bonkowsky v. Bonkowsky*, 19 Ohio Op. 3d 113 (Ct. App. 1980), *aff'd*, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert. denied*, 102 S. Ct. 2963 (1982), for a recent Ohio tort case adopting interest analysis, and *S & S Chopper Serv. v. Scripser*, 59 Ohio App. 2d 311, 394 N.E.2d 1011 (1977), for an Ohio contract case using the modern analysis.

ever,¹⁰ and, indeed, different theories often are employed in a single case.¹¹ This situation illustrates the lingering uncertainty and disagreement over the proper law to employ in causes of action including more than one state.

Ohio has not been immune to this problem. *Osborn v. Osborn*,¹² a 1966 case, contained the first mention of more modern conflicts methodologies in the area of contract law. This decision was followed in 1971 by *Fox v. Morrison Motor Freight*,¹³ in which a majority of the Ohio Supreme Court purported to abandon the traditional choice-of-law rule for tort cases, *lex loci delicti*. Just one year later, however, the same court balked at discarding *lex loci* completely.¹⁴ The mid and late seventies brought an even greater retreat toward traditional rules in tort¹⁵ and contract.¹⁶ Consequently, Ohio currently uses a strange admixture of old and new approaches without following any theory consistently. Indeed, the Texas Supreme Court recently cited Ohio as one of the traditional jurisdictions,¹⁷ and one commentator placed it among the states that have abandoned *lex loci* in tort.¹⁸ The substantial ambiguity and perplexing inconsistencies of Ohio law demonstrate the current need for a more systematic approach to choice of law in Ohio.

This Note attempts to confront the lack of harmony and certainty in present-day choice of law, examine it, and draw conclusions about the current status of this area of Ohio law. As a starting point, this Note will survey the major traditional and modern approaches currently being implemented. It will explore the role of these theories in Ohio tort and contract cases of the last fifteen years. This Note then will attempt to reconcile the use of conflicting choice-of-law theories and will outline the present Ohio approach. Finally, current Ohio practice will be studied and its shortcomings identified. Suggestions will be provided for a more fair and efficient disposition of future choice-of-law cases.

10. For a sample of the application of modern approaches, see *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976) (adoption of the comparative impairment test); *Lillenthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (use of Currie's preference for the law of the forum); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979) (adoption of *Second Restatement's* most significant relationship test); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (use of the better rule of law approach). Conflicts theories are in no sense restricted to application internally in the U.S. Indeed, a synonym for "conflict of laws" is "private international law." A. KUHN, *PRIVATE INTERNATIONAL LAW* 1 (1937). The choice-of-law theories mentioned in this Note are in no sense unique to our system of law, nor limited to domestic utilization. See K. LIPSTAIN, *PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTERNATIONAL* 1-46 (1981).

11. See, e.g., *McCluskey v. Rob San Serv.*, 443 F. Supp. 65 (S.D. Ohio 1977).

12. 10 Ohio Misc. 171, 226 N.E.2d 814 (Cuyahoga County C.P. 1966), *aff'd*, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969).

13. 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971).

14. *Schiltz v. Meyer*, 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972).

15. *McCluskey v. Rob San Serv.*, 443 F. Supp. 65 (S.D. Ohio 1977).

16. *Arsham v. Banci*, 511 F.2d 1108 (6th Cir. 1975).

17. *Gutierrez v. Collins*, 583 S.W.2d 312, 316 (Tex. 1979).

18. R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 6.16, at 305-06 n.47 (2d ed. 1980).

II. OVERVIEW OF CHOICE-OF-LAW THEORIES

To understand the development of choice of law in Ohio, one first must become familiar with both the traditional and the modern approaches to this area of the law. Because the field is in a state of transition, one finds a mixture of old and new methodologies in almost every recent conflicts case. An attorney confronted with a choice-of-law issue must be prepared to deal with several theories. Although this situation complicates the task of the practitioner, it also provides him or her with a great deal of freedom to argue effectively on the merits of the particular case.

A. Lex Fori—*The Primitive Approach*

The oldest, most basic approach is of necessity the proper starting point for a survey of traditional choice-of-law methodologies. That approach is *lex fori*, the rule by which a court always applies its own law, whether public or private.¹⁹ Although the forum oriented system has not survived in its original form, it remains relevant to current conflict-of-law theory in two important respects. First, courts have continued to apply only the law of the forum in matters of public law.²⁰ Second, *lex fori* still is used exclusively to resolve procedural issues,²¹ including issues of remedy.²² In addition, because a forum is most comfortable applying its own law and owes allegiance to its own jurisdiction's lawmaking bodies, *lex fori* constitutes a residual conflicts rule on which courts rely when uncertain.²³ Some advocates of modern choice-of-law theories have incorporated in the systems they propose a preference for the law of the forum.²⁴

B. *The Traditional Approach*

1. *Underlying Concepts*

The traditional theories of conflict of laws that had been articulated by Ulrichus Huberus in the seventeenth century became the basis for American thought on the subject as a result of the work of Justice Story, a leading jurist and legal scholar of the nineteenth century. Story's principal contribution to

19. *Id.* §§ 105, 107–108 (1962). This volume contains a thorough discussion of the history of *lex fori* and its use internationally. The system of law that governs the relationship between the state, in its role as sovereign, and the individual is denoted as "public." This category includes criminal law. BLACK'S LAW DICTIONARY 1106 (5th ed. 1979). Private law, on the other hand, controls the relations between individuals in their private capacities. *Id.* at 1076.

20. E. SCOLES & P. HAY, CONFLICT OF LAWS § 3.17 (1982).

21. R. LEFLAR, AMERICAN CONFLICTS LAW § 121 (3d ed. 1977).

22. *Id.* § 126.

23. E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.7, at 22 (1982).

24. See, e.g., Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965). See also *infra* text accompanying notes 59–61.

American choice of law was the promulgation of the doctrine of comity. Early in this century Joseph H. Beale's work contributed a second major doctrine to the evolution of choice of law in America, the doctrine of vested rights.²⁵ The contributions of these three scholars formed a strong foundation for the evolution of choice of law in the United States.

These twin doctrines of comity and vested rights are a crucial part of conflicts theory. Comity and reciprocal recognition of foreign law assume that a state's law has effect only within its territorial boundaries,²⁶ but acknowledge that the need for justice and cooperation between states requires the courts of a state to enforce certain rights arising under foreign law.²⁷ The doctrine of vested rights rests on the premise that once a legal relation is created by the substantive law of a state in which the underlying events occurred, that right assumes an independent existence, which transcends territorial boundaries.²⁸ While the concepts of comity and vested rights are inconsistent on a fundamental, theoretical level, in practice they are complementary. For only when rights are sufficiently vested "at home" will they be enforced, through comity, abroad.²⁹

2. *The Approach of the First Restatement*

The major traditional approach for choice of law is embodied in the *Restatement of the Conflict of Laws*. Under the first *Restatement* issues of private law are placed in broad categories that roughly correspond to major subject areas of law, such as tort or contract. Each category is governed by a specific set of rules. For example, in tort *lex loci delicti*, the law of the place of the wrong, controls.³⁰ In contract, issues of the interpretation, existence, and nature of a contract are governed by *lex loci contractus*, the law of the place where the agreement is made.³¹ Issues of performance are covered by *lex solutionis*, the place where the contract is to be carried out,³² and questions of remedy are determined by *lex fori*.³³

The traditional approach to choice of law has been in use for many decades³⁴ and has not lost its place as the backbone of this area of the law. Despite its age and importance, however, the shortcomings of the traditional system have prompted considerable criticism. For although the old rules have the advantage of uniformity, they are seen by some as being too rigid and

25. See generally K. NADELMANN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 1-40 (1972).

26. J. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS § 18 (1935).

27. R. GRAVESON, CONFLICT OF LAWS § 3 (7th ed. 1974); E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.4 (1982).

28. E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.5 (1982).

29. J. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS §§ 15, 16, 48 (1935).

30. RESTATEMENT OF THE CONFLICT OF LAWS §§ 377, 379 (1934).

31. *Id.* § 332.

32. *Id.* § 358.

33. *Id.* § 372.

34. One of the earliest Ohio cases to use this approach was *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N.E. 69 (1891).

mechanical.³⁵ The traditional system was attacked by one of its earliest critics because it did not consistently achieve justice in every case.³⁶ It also has been denigrated for failing to inquire into the content of a competing state's laws.³⁷ In addition, some commentators have discredited the traditional rules because they often require courts to make blind choices that result in the application of a state's law even though that state has no interest in the action.³⁸

C. Modern Theories

These problems with the traditional approach have led scholars to search for alternatives. In general, these new theories replace the rule oriented methodology of the first *Restatement* with more flexible, general guidelines. The new approaches provide guidelines that courts should consider in conflicts decisions. These methodologies do not dictate which law is to be applied, but instead delegate to the courts the task of weighing the factors in light of the circumstances of the particular case.

Because the basic approaches of the major new conflicts theories overlap considerably, a description of their general components should suffice as a background for the discussion of the development of Ohio choice of law.³⁹ This section discusses the following three approaches: (1) Interest analysis (Currie's in particular⁴⁰), (2) the *Second Restatement*,⁴¹ and (3) Leflar's choice-influencing considerations.⁴² All these approaches contain elements of interest analysis in the sense that each provides for some investigation into the governmental concerns that arise in multistate litigation. Their methodology is sufficiently different, however, to make a study of their individual characteristics fruitful.

1. Interest Analysis

In its broadest sense, interest analysis looks beyond adherence to mechanical rules and focuses on the possible justifications for their application. Those who advocate a departure from the traditional approach believe that multistate causes of action generate concerns on the part of many or all of the states involved.⁴³ For example, the new school of conflicts recognizes

35. See, e.g., W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 754-55 (1963). See also *supra* text accompanying note 1.

36. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *HARV. L. REV.* 173, 173-203 (1933). See also *Fox v. Morrison Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971), an Ohio case in which the traditional approach was attacked for failing to achieve justice.

37. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *HARV. L. REV.* 173, 192-97 (1933).

38. See *infra* text accompanying notes 50-52.

39. This Note's discussion of choice-of-law developments is limited to the attributes of three major approaches. Readers seeking a more thorough study of the field will find an excellent bibliography of the essential sources on conflicts law in J. MARTIN, *CONFLICT OF LAWS* 3-4 (1978).

40. See *infra* text accompanying notes 48-54.

41. See *infra* text accompanying notes 62-83.

42. See *infra* text accompanying notes 84-93.

43. See, e.g., Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW; LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 349, 357 (1961).

that although the place of the injury may be very important in tort actions, the only reasonable choice of law is not necessarily the law of the state where the injury occurred.⁴⁴ Proponents of the new school submit that a court should consider all relevant interests before making a conflicts decision.⁴⁵ In this respect, interest analysis is an attempt to tailor the choice of law to the facts under litigation to achieve a more just outcome in actions with consequences in more than one state.

a. *Interest Analysis in General*

Although theories of interest analysis contain many variations, one can generalize to some extent about the methodology of this approach to conflicts law. As one scholar has noted,

A governmental interest in a choice-of-law case, in its simplest sense, is discoverable by putting together (a) the reasons supporting the rule of law in question (*F*'s or *X*'s law) and (b) the state's (*F*'s or *X*'s) factual contacts with a case, or the issue in a case, to see if they match.⁴⁶

Interest analysis can be illustrated by the following example. Assume that an Ohio resident is injured by an Idaho resident in an automobile accident in Idaho, and further, that Ohio has no limit on damages, while Idaho permits recovery only for medical expenses. Ohio would have a legitimate interest in compensating resident accident victims, while Idaho justifiably would be concerned about protecting resident defendants and their insurers from higher recoveries. The general inclination of the courts that have adopted interest analysis has been to weigh the competing governmental interests and apply the law of the state with the greatest overall concern in the particular issue. Although advocates of interest analysis agree on the approach in general, they are often at odds regarding the specific circumstances to be analyzed and the relative weights of each of these considerations.⁴⁷ The following survey of the major methodologies demonstrates this lack of harmony in modern choice of law.

b. *The Currie Approach*

One of the leading theories in current conflicts law is that of Brainerd Currie.⁴⁸ This legal scholar provided the initial impetus for what has become a mushrooming field of intellectual debate. Although Currie's system for choice

44. See, e.g., E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 17.2-3 (1982); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* §§ 1.1-3 (2d ed. 1980).

45. See, e.g., R. LEFLAR, *AMERICAN CONFLICTS LAW* § 106 (3d ed. 1977).

46. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 291 (1966).

47. See, e.g., *id.* at 291-93. Compare Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966), with Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971). Leflar includes the better rule of law as a consideration in choice of law, while Cavers finds it irrelevant, if not misleading.

48. For a comprehensive collection of Currie's writing, see B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

of law often is grouped with other theories of interest analysis, the Currie system is unique because it utilizes a very limited study of governmental concerns. Currie was the first to propose a study of interests as an alternative to traditional conflicts methods,⁴⁹ and because of his prolific, well-written commentary on conflicts, his approach is important to an understanding of the field.

Under the Currie system of choice of law courts must consider three contacts: (1) the domicile of the parties, (2) the place where the relevant events occurred, and (3) the place where the action is brought.⁵⁰ In general, this approach directs courts to ascertain the policies expressed in the potentially applicable law and to consider the extent to which the involved states could be reasonably interested in having these policies applied.⁵¹ The courts then should look closely at the specific interests of the states; attempt, if possible, to resolve any conflicts; and then proceed to apply the law of the state with the paramount interests.⁵²

Currie's most important contribution to the field of choice of law, however, is the distinction between a true conflict of interest, which arises when two or more states have significant interests that are at odds, and a false conflict, which occurs when only one state has a real concern in having its law applied.⁵³ This true-false dichotomy has been lauded by other legal scholars and the courts.⁵⁴

*Hurtado v. Superior Court*⁵⁵ demonstrates the adoption of Currie's analysis by a California court.⁵⁶ Plaintiffs were residents of Mexico and defendants resided in California. Mexico limited the recovery for wrongful death; California did not.⁵⁷ The California Supreme Court refused to apply the law of Mexico, plaintiff's domicile, arguing that Mexico had no interest in protecting a nonresident defendant, and was not concerned with denying recovery to Mexican widows and orphans.⁵⁸

In addition to promoting the greatest possible use of false conflicts, Currie placed strong emphasis on the law of the forum.⁵⁹ In the Currie approach *lex fori* applies to every case in which a flexible interpretation of the interests concerned does not yield a false conflict. Currie suggested that inter-

49. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 92 (3d ed. 1977).

50. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 231-32 (1958).

51. Currie, Comments in *Babcock v. Jackson*, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963).

52. *Id.* at 1242-43.

53. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251-63 (1958).

54. J. MARTIN, *PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW* 85 (1980); see, e.g., *infra* text accompanying notes 58 & 151.

55. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

56. *Id.* at 579-82, 522 P.2d at 669-71, 114 Cal. Rptr. at 109-11.

57. *Id.* at 578, 522 P.2d at 668, 114 Cal. Rptr. at 108.

58. *Id.* at 581-82, 522 P.2d at 670-71, 114 Cal. Rptr. at 110-11.

59. E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 2.6, at 38-39 n.1 (1982).

ests should be considered in choice-of-law decisions and eschewed the blind application of any law. Nevertheless, he did not abandon completely the more traditional jurisdiction-selecting approaches in favor of a law-selecting⁶⁰ system of conflicts.⁶¹

2. *The Second Restatement*

The approach of the *Restatement (Second) of Conflict of Laws* is a compilation of the ideas advanced by a number of legal scholars.⁶² The drafters sought to synthesize the traditional and modern approaches. The result was a three-tiered system that progresses from the general to the specific. Section 6 lists 7 considerations that are relevant to every choice-of-law decision.⁶³ These include, but are not limited to, the following: Policies of the forum⁶⁴ and of "other interested states";⁶⁵ policies prevalent in "the particular field of law";⁶⁶ "certainty, predictability, and uniformity of result";⁶⁷ and "protection of justified expectations."⁶⁸ Subsequent sections list specific guidelines for particular areas of law. In tort, section 145 requires the application of the law with the "most significant relationship" to the event and the parties. The relevant contacts are (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile of the parties; and (4) the place of the relationship.⁶⁹ Note that this approach differs from Currie's system in that the *Second Restatement* does not contain a preference

60. *Id.* § 2.6, at 19-20.

61. Currie, Comments in *Babcock v. Jackson*, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242-43 (1963). It is interesting to note that Currie favors this result even when the forum has no interest whatsoever in the application of its own law.

62. As one legal scholar has stated, "By and large, the new *Restatement* is a monument to the fundamental changes that have in the last decades taken place in American thinking regarding the choice-of-law problem." von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 964 (1975). But see Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700, 701 (1963). Ehrenzweig noted that many of the leading conflicts scholars opposed the drafting of a second Restatement and did not participate in its formulation.

63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). The full text of § 6 is as follows:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
 (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 (a) the needs of the interstate and international systems,
 (b) the relevant policies of the forum,
 (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 (d) the protection of justified expectations,
 (e) the basic policies underlying the particular field of law,
 (f) certainty, predictability, and uniformity of result, and
 (g) ease in the determination and application of the law to be applied.

For a description of the underlying policies and objectives of the *Second Restatement*, see Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963).

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (1971).

65. *Id.* § 6(2)(c).

66. *Id.* § 6(2)(e).

67. *Id.* § 6(2)(f).

68. *Id.* § 6(2)(d).

69. *Id.* § 145.

for *lex fori*. Although both section 6 and section 145 are consistent with modern trends, the last section, section 146, refers the court to the law of the place of the injury unless another state has a more significant relationship to the event and the parties.⁷⁰ Thus, the *Second Restatement* retains a preference for the traditional *lex loci delicti*.

The *Second Restatement's* rules for contracts⁷¹ are very similar to its approach for torts. Again, the general considerations of section 6 apply.⁷² The second prong of the contracts rules mandates the application, when possible, of the law of the state chosen by the parties.⁷³ In the absence of an effective choice by the parties, the *Second Restatement* requires application of a most significant relationship test and lists the relevant contacts.⁷⁴ These include the place where the contract was negotiated and made, the place of performance, the place where the subject matter is located, and the residence or domicile of the parties.⁷⁵

To this point the approach is very much in line with modern thinking: it is flexible and does not preclude tailoring a choice-of-law decision to the circumstances of the particular case. However, section 188 adds that the local law⁷⁶ of the state in which the agreement is negotiated and performed will be applied when both of these events occur in one state.⁷⁷ Although this last provision is not as reminiscent of traditional rules as is section 146 in tort, it significantly reduces the flexibility of a court that has adopted the *Second Restatement*.

Undoubtedly, the drafters' attempt to reduce the advances of recent years to a coherent set of rules is a significant contribution to the development of conflicts theory.⁷⁸ At a minimum, the *Second Restatement* provides a fairly comprehensive list of the major considerations in choice of law. As one commentator has noted, "[T]he Second Restatement, with its generalities and lack of priorities, lends itself to all comers"⁷⁹

The *Second Restatement*, however, has not been immune to criticism.⁸⁰ At least one scholar has characterized it as an attempt to furnish rules in an

70. *Id.* § 146.

71. *Id.* §§ 6, 187, 188.

72. *See supra* note 63.

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

74. *Id.* § 188(2).

75. *Id.*

76. A problem arises when one state's choice-of-law rules refer the court to the law of another state, including the conflicts rules. This may result in an endless seesawing from the law of one state to that of the other. To avoid this problem, conflicts rules often require the application of only the foreign state's substantive law. This doctrine is called *renvoi*. A brief discussion of the concept may be found in R. LEFLAR, AMERICAN CONFLICTS LAW § 7 (3d ed. 1977). For a lengthier and more historical treatment of this subject, see R. GRAVESON, CONFLICT OF LAWS 64-77 (7th ed. 1974).

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(3) (1971).

78. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROBS. 860, 861 (1963).

79. Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1667 (1981).

80. *See, e.g.,* Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700 (1963).

area of law not yet sufficiently developed to provide clear guidelines, rather than a systematic record of the law as it actually is used by the courts.⁸¹ In addition, the *Second Restatement* fails to consider the interests of the forum *qua* forum, which certain commentators have seen as an important consideration in any choice-of-law decision.⁸² Furthermore, because the *Second Restatement* approach is vague in its first two levels of analysis, those who seek uniform results in conflicts law may not be satisfied.⁸³

3. Leflar's Choice-Influencing Considerations

The third major conflicts methodology, that of Professor Leflar, is very similar to the *Second Restatement* approach in its flexibility. Indeed, it can be considered a variation of interest analysis⁸⁴ because it provides no hard and fast rules, but rather requires a study of many different considerations. Instead of the *Second Restatement's* multifaceted, multitiered approach, Leflar provides only five "choice-influencing considerations" that apply to all areas of the law.⁸⁵ According to Leflar, the following considerations should be weighed by the courts: (1) Predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law.⁸⁶ Leflar's approach differs significantly from other theories in its inclusion of the better rule of law, defined as "superiority of one rule of law over another, in terms of socio-economic jurisprudential standards"⁸⁷ The suggestion that choice-of-law decisions should be based, even in part, on the bench's view of the optimal law has evoked considerable controversy.⁸⁸ In the opinion of some critics, the better rule method allows for arbitrary decisions based on ambiguous standards.⁸⁹

Leflar is unique also because he has taken no credit for developing the individual elements of his approach.⁹⁰ He has argued that his five considerations encompass all the important advancements in the field and that they are sufficient in themselves to resolve fairly and adequately any choice-of-law

81. See E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 2.15 (1982). But see, e.g., Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

82. See, e.g., *supra* text accompanying note 59.

83. See, e.g., von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

84. See *supra* text accompanying notes 43-61.

85. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

86. *Id.*

87. *Id.* at 296. For application of this principle in a leading case, see *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

88. See, e.g., Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 212-15 (1971), for criticism of this approach. In agreement with Leflar, see, e.g., R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 6.27 (2d ed. 1980).

89. See generally Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 213 (1971); Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802 (1963).

90. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966). Others, however, credit Leflar with being the father of the better rule of law principle. See, e.g., Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 213 (1971).

issue that may arise.⁹¹ Because both its author and its proponents have espoused it as a complete system that realistically represents the current status of the law,⁹² Leflar's system has appealed to some state courts.⁹³

III. OHIO CHOICE OF LAW IN CONTRACT CASES

If Ohio were not currently straddling the old and the new conflicts methodologies, familiarity with the variety of approaches and the current intellectual debate in the field would not be necessary. Because the uncertainty in the field of conflicts apparently will not be eliminated in the immediate future, the bench and the bar alike must strive to make the best use of the scant authority available. This effort requires careful investigation of existing Ohio cases. Although the identification of clear-cut guidelines is unlikely, a study of precedent serves to uncover the general trends of the law in recent years. A review of Ohio cases also will reveal the inadequacies of past decisions and facilitate a more intelligent disposition of future cases.

Although Ohio first considered modern conflicts theories in a contracts case,⁹⁴ Ohio courts generally have been more hesitant to accept interest analysis in contract than in tort. The flexibility of the traditional rules for contract may explain this lag. Because courts are able to tailor the traditional rules to provide justice in the individual case, these rules have been more resistant to erosion.

A. The Traditional Rules and Their Applications in Earlier Cases

Under traditional conflict rules for contract, issues are divided into categories. A different rule applies to each issue. As indicated above, *lex loci contractus*, the place of the making, controls issues of existence, interpretation, and nature of the contract; *lex solutionis*, the place where the contract is carried out, governs issues of performance; and *lex fori*, the law of the forum, decides issues of remedy.⁹⁵ Ohio accepted these rules as early as 1927 in *North British & Mercantile Insurance Co. v. Garber*.⁹⁶ This case also exemplifies the use of the traditional escape device, public policy. Under the public policy exception courts refuse to utilize an otherwise applicable foreign law because it is repugnant to the policy of the forum.⁹⁷ The *North British* court declined to enforce an unfiled conditional sales contract made in Utah, where it was valid, against an innocent purchaser. Ohio had enacted legislation protecting persons who bought property without notice of the existence of

91. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 10-11 (1977).

92. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 281 (1966).

93. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.27, at 328 n.41 (2d ed. 1980), for a list of states that have used Leflar's better law approach.

94. *Osborn v. Osborn*, 10 Ohio Misc. 171, 226 N.E.2d 814 (Cuyahoga County C.P. 1966), *aff'd*, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969).

95. See *supra* text accompanying notes 31-33.

96. 5 Ohio L. Abs. 746 (Montgomery County Ct. App. 1927).

97. *Id.* at 746. See, e.g., *infra* text accompanying note 149.

such a contract. The court considered itself bound to give effect to this policy and, therefore, refused to apply Utah law.⁹⁸

In 1941 the traditional rules for choice of law were ratified once again in *Alropa Corp. v. Kirchwehm*.⁹⁹ The *Alropa* court emphasized that remedies are governed by *lex fori*. It restated the general rule that statutes of limitation are remedial,¹⁰⁰ but specified an important exception to that rule when a borrowing statute was in force. In 1941 such a law existed in Ohio. Ohio's borrowing statute required displacement of the forum's statute of limitation by the statute of the state where the injury occurred if that time period was shorter.¹⁰¹ Because Florida, the place where the defendants executed and defaulted on the mortgage, had a shorter statute of limitations, its law precluded recovery.¹⁰²

Standard Agencies v. Russell,¹⁰³ which followed *Alropa* in 1954, demonstrated Ohio's continued acceptance of the traditional conflicts rules in contract. The *Standard Agencies* court held that whether a contract is usurious must be determined by *lex loci contractus*. The court further noted that because public policy had not been violated, Indiana law, the law of the place where the agreement was made, applied.¹⁰⁴

B. *Osborn v. Osborn—Isolated Recognition of the Modern Approach*

In 1966 an Ohio court of common pleas reached a decision that differed from both previous and subsequent contract cases in its adoption of a modern method for choice of law. *Osborn v. Osborn*¹⁰⁵ concerned an antenuptial agreement between a Massachusetts and an Ohio resident. The contract had been drafted in Ohio and executed in Massachusetts. Although the ceremony was performed in Massachusetts, the couple thereafter made their home in Ohio.¹⁰⁶ The wife, plaintiff in this case, sued her deceased husband's trustee and executor to invalidate the contract and claimed that the parties had intended that Ohio law govern.¹⁰⁷ She argued that the court, therefore, should apply Ohio law and strike down the agreement.¹⁰⁸ The court found that Ohio law controlled, but nevertheless held that the contract was binding.¹⁰⁹

98. 5 Ohio L. Abs. 746, 746 (Montgomery County Ct. App. 1927).

99. 138 Ohio St. 30, 34-35, 33 N.E.2d 655, 657 (1941).

100. The Ohio Supreme Court stated:

Whatever pertains to the remedy is to be determined by the law of the forum alone. This is so because each state regulates its own jurisprudence in its own way. It has its own way of enforcing rights and redressing wrongs. This in no way depends upon what the parties have agreed to, but to the policy of the law of the forum as a matter of its internal . . . [policy].

Id. at 37, 33 N.E.2d at 658 (quoting *Coral Gables, Inc. v. Christopher*, 108 Vt. 414, 417, 189 A. 147, 149 (1937)).

101. OHIO GEN. CODE § 11,234 (1910) (repealed 1965).

102. *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 40, 33 N.E.2d 655, 658 (1941).

103. 100 Ohio App. 140, 135 N.E.2d 896 (1954).

104. *Id.* at 143, 135 N.E.2d at 898-99.

105. 10 Ohio Misc. 171, 226 N.E.2d 814 (Cuyahoga County C.P. 1966), *aff'd*, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969).

106. *Id.* at 172-73, 226 N.E.2d at 815-16.

107. *Id.* at 172, 226 N.E.2d at 815.

108. *Id.* at 175, 226 N.E.2d at 817.

109. *Id.* at 182, 226 N.E.2d at 821.

Although the traditional rule would have required application of Massachusetts law, the *Osborn* court decided that when a contract is made in one state in anticipation of performance in another, the law of the latter state determines the validity, obligations, and effect of that agreement.¹¹⁰ This holding would have resolved the issue, but the court nevertheless continued, noting that Ohio followed the American Law Institute's "most significant contacts" approach.¹¹¹ According to the *Osborn* court, this approach requires more emphasis on the intentions of the parties and other relevant considerations.¹¹² The court noted that Ohio had a great interest in the marital relations and property rights of its citizens. Because both the married couple and the property were located in Ohio, and because the defendants also resided there, the court concluded that Ohio possessed "the most significant contacts with and a paramount interest in" the contract.¹¹³

As early as 1966, then, an Ohio case not only demonstrated judicial awareness of the developments in choice-of-law theory, but also indicated an understanding of the theory's proper application. The *Osborn* court cited no major precedent for its approach; the lack of precedent was not even raised in the court of appeals, where the trial court's decision was reversed on other grounds.¹¹⁴ In the end, however, the Ohio Supreme Court reinstated the verdict of the lowest court, again with no mention of the choice-of-law issue.¹¹⁵

C. Continued Adherence to Traditional Rules

Although *Osborn* appeared to change the direction of choice of law in Ohio, subsequent decisions failed to follow this case. In *Arsham v. Banci*¹¹⁶ the United States Court of Appeals for the Sixth Circuit continued Ohio's reliance on traditional methodologies. *Arsham* concerned a breach of an oral contract,¹¹⁷ and the issue was whether the agreement was invalid under the New York statute of frauds.¹¹⁸ The court maintained that Ohio employed *lex loci contractus*, the traditional rule, and recognized that Ohio treated statutes of fraud as procedural. The court noted, however, that if the statute of the state where the contract was made would invalidate the agreement, Ohio courts also would refuse enforcement¹¹⁹ because a contract void where made is void everywhere.¹²⁰

110. *Id.* at 176, 226 N.E.2d at 818.

111. *Id.* at 176-77, 226 N.E.2d at 818. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

112. *Osborn v. Osborn*, 10 Ohio Misc. 171, 176, 226 N.E.2d 814, 818 (Cuyahoga County C.P. 1966), *aff'd*, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969).

113. *Id.* at 177, 226 N.E.2d at 818.

114. 18 Ohio St. 2d 144, 147, 248 N.E.2d 191, 192 (1969).

115. *Id.*

116. 511 F.2d 1108 (6th Cir. 1975).

117. *Id.* at 1110.

118. *Id.* at 1114.

119. *Id.*

120. *Id.* (quoting 9 OHIO JUR. 2D *Conflict of Laws* § 116 (1954)).

This reasoning is identical to that used in the vested rights theory of choice of law. Under a vested rights system, for a right to vest in the plaintiff the right must accrue by the law of the state where the underlying event occurred. Only then can the plaintiff assert that right in a different jurisdiction.¹²¹ The court's use of vested rights analysis reflects Ohio's strong adherence to the traditional theories enumerated in the first *Restatement*.¹²²

Perlmutter Printing Co. v. Strome, Inc.,¹²³ another case concerning an oral contract, was decided by a federal court shortly after *Arsham*. In *Perlmutter* the District Court for the Northern District of Ohio affirmed Ohio's continued reliance on *lex loci contractus* and declared that the statute of frauds was procedural and remedial and, therefore, controlled by *lex fori*.¹²⁴ Noting that the laws of Ohio and New Jersey were nearly identical, the *Perlmutter* court applied Ohio law.¹²⁵

D. Influence of Modern Theories in Contract

Finally, in 1977, eleven years after the decision in *Osborn* and subsequent to *Fox v. Morrison Motor Freight*,¹²⁶ discussed below, an Ohio appellate court showed a willingness to employ the new conflicts theories in a contract case. *S & S Chopper Service v. Scriptor*¹²⁷ adopted the approach of the *Second Restatement*.¹²⁸ The suit arose from a crop dusting contract between plaintiff, a Michigan corporation doing business in Michigan and Ohio, and defendant, a Florida resident doing business in Florida and Ohio. Each party had signed the agreement in his home state. Scriptor had terminated his employment with S & S Chopper Service. Plaintiff sued Scriptor for violation of a clause in the agreement that prohibited Scriptor from competing with his former employer. The subject matter of the contract was crop-dusting services to be performed almost exclusively in Ohio. Michigan law voided the clause; in Ohio and Florida it was enforceable if reasonable. The court decided to apply Ohio law.¹²⁹

In upholding the decision of the lower court the appellate court found that the principles of section 6 of the *Second Restatement*¹³⁰ and the contacts listed in section 188¹³¹ had been adequately considered below.¹³² Because the parties had contemplated performance of the contract in Ohio, the court held

121. See R. LEFLAR, AMERICAN CONFLICTS LAW § 86 (3d ed. 1977), for an excellent discussion of this concept.

122. See *supra* part II(B)(2).

123. 436 F. Supp. 409 (N.D. Ohio 1976).

124. *Id.* at 413. See *supra* text accompanying notes 21-22.

125. 436 F. Supp. 409, 413 (N.D. Ohio 1976).

126. 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971).

127. 59 Ohio App. 2d 311, 394 N.E.2d 1011 (1977).

128. *Id.* at 312-13, 394 N.E.2d at 1012-13.

129. *Id.* at 311-13, 394 N.E.2d at 1012-13.

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). See *supra* text accompanying notes 62-75.

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

132. *S & S Chopper Serv. v. Scriptor*, 59 Ohio App. 2d 311, 313, 394 N.E.2d 1011, 1013 (1977).

that Ohio had the "most significant relationship to the transaction and the parties."¹³³ Note that the issue was the validity of a clause in the contract; this issue would be governed by *lex loci contractus* under the traditional rules. Therefore, not only the analysis but also the result of *Chopper Service* indicates a decreasing reliance on traditional conflicts methodologies. Still, the court did not state explicitly that it was abandoning the approach of the first *Restatement*. A careful study of the reasoning in this case leads to the conclusion that, for this court, the old rules coexisted with the new.¹³⁴

E. *The Current Status of Ohio Choice of Law in Contract*

It would be misleading to suggest that the above survey of Ohio contracts cases has revealed a definite trend in Ohio law. While the holdings of *Standard Agencies*, *Alropa*, *Arsham*, and *Perlmutter* suggest that the traditional choice-of-law rules are firmly entrenched in Ohio, *Osborn* and *Chopper Service* cast doubt on this conclusion. Despite the lack of a clear-cut line of precedent, however, Ohio law seems to have changed in the last two decades and probably will continue its metamorphosis. The four cases using traditional methodologies indicate that Ohio courts favor the use of the first *Restatement* for the majority of cases. *Osborn* and *Chopper Service* are not inconsistent with this conclusion, but rather spell out an exception to it. When courts find that traditional rules do not resolve the case at hand adequately, they may turn to the newer type of analysis. Thus, if justice, logic, or the expectations of the parties demand the application of a law other than that mandated by the traditional rules, a progressive court is likely to invoke the methodology of interest analysis. The existence of cases such as *Osborn* and *Chopper Service* might facilitate arguments of counsel and decisions by the courts that depart from the traditional rules. In addition, the trend toward more flexible choice-of-law rules in tort, outlined below,¹³⁵ may provide further impetus toward change. Ultimately, however, courts will invoke interest analysis only when they perceive that its application will produce significant benefits.

IV. OHIO CHOICE OF LAW IN TORT CASES

Developments in Ohio conflicts law in the area of tort parallel those in contract. In general, the traditional, rule oriented approach has been undermined by the flexible, case-by-case analysis of modern theories. Because only one traditional choice-of-law rule exists for tort, *lex loci delicti*,¹³⁶ and be-

133. *Id.* at 311, 394 N.E.2d at 1012.

134. *Id.* at 312-13, 394 N.E.2d at 1012-13. Although the court repeatedly referred to the *Second Restatement*, which lists four considerations for a choice-of-law decision, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 188 (1971), the court did not deny that Ohio uses the traditional *lex solutionis*, the law of the place of performance.

135. *See infra* part IV.

136. *See supra* text accompanying note 30.

cause this rule is inherently less amenable to adjustment to the equities of individual cases, the Ohio courts generally have been more dissatisfied with traditional methodologies. This dissatisfaction has encouraged a trend toward adoption of interest analysis in tort that is more marked than the trend in other areas of conflicts law.

In addition, several other factors have made Ohio courts more receptive to the new modes of analysis in cases concerning injury to the person. First, because tort litigation often arises from fortuitous events that adversely affect the health and welfare of the victims, some courts tend to disfavor a choice-of-law rule such as *lex loci delicti*, which may force them to make decisions that they believe are fundamentally unfair.¹³⁷ Second, the existence of guest statutes, wrongful death statutes, and comparative or contributory negligence standards that differ widely from state to state has resulted in a relatively large number of multistate tort cases in which choice of law is crucial to recovery.¹³⁸ Accordingly, courts have frequently been forced to consider the merits of *lex loci delicti*. Third, catastrophic events like the Chicago airport disaster¹³⁹ and the recent crash of Air Florida Flight 90 in Washington, D.C.¹⁴⁰ give rise to huge multistate litigation and place conflicts law in the spotlight. Tort law thus has been at the forefront of the reevaluation of choice-of-law rules, both in the nation generally and in Ohio specifically.

A. *The Beginnings of Modern Choice of Law in Ohio—Fox v. Morrison Motor Freight*

Ohio retained *lex loci delicti*, the traditional tort rule, long after other courts had begun to adopt interest analysis and similar theories.¹⁴¹ Finally, in the 1971 decision of *Fox v. Morrison Motor Freight*¹⁴² the Ohio Supreme Court critically examined the established conflicts methodologies and adopted a more modern approach for resolving multistate issues. Five years had passed since the *Osborn* court had mentioned the modern theories.¹⁴³ The *Fox* case is extremely important to Ohio conflicts law because it established the theoretical framework for the subsequent development of modern choice of law in this state.

137. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 173-203 (1933). See also *Fox v. Morrison Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971), an Ohio case in which the traditional approach was attacked for failing to achieve justice.

138. See, e.g., *Schiltz v. Meyer*, 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972) (Ohio's application of its own guest statute precludes recovery); *Fox v. Morrison Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971) (Illinois limitation on damages for wrongful death not applied because of Ohio's policy of full recovery).

139. *In re Air Crash Disaster near Chicago, Illinois*, on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

140. See *Air Crash Bar Mobilizes to Plot D.C. Strategy*, Nat'l L.J., Feb. 1, 1982, at 3, col. 1.

141. Indeed, Ohio explicitly recognized that as early as 1965, eighteen states already had discontinued strict adherence to *lex loci delicti*. *Fox v. Morrison Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971). For an example of one of the earliest and most influential decisions using a more flexible, modern analysis, see *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

142. 25 Ohio St. 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971).

143. See *supra* notes 105-15 and accompanying text.

Fox v. Morrison Motor Freight was a suit for wrongful death by an Ohio administrator of the estate of an Ohio decedent against a corporation that had trucking terminals in Ohio. The accident in which the Ohio resident was killed occurred in Illinois. Both drivers, however, had started their journeys in Ohio and had planned to end them there.¹⁴⁴ Unlike Ohio, Illinois placed a limit on damages for wrongful death. The Ohio Supreme Court refused to follow the traditional *lex loci* rule. Instead, it decided that Ohio law should be applied.¹⁴⁵ Although all the justices agreed on the result, they could reach no consensus on the correct analysis.

The majority opinion, written by Justice Duncan and joined by five members of the court, acknowledged Ohio's deeply ingrained dependence on *lex loci delicti*.¹⁴⁶ Nevertheless, Justice Duncan criticized the traditional rule, arguing that it did not consistently produce just results and that its automatic application should be abandoned.¹⁴⁷ He noted that because the Ohio Constitution prohibited limitation on recovery for wrongful death¹⁴⁸ the court would have been justified in invoking the public policy exception to *lex loci*.¹⁴⁹ This exception traditionally is invoked when the application of the law mandated by conflicts rules is repugnant to the forum's legislative policy.¹⁵⁰ Justice Duncan apparently saw a need for change in this area of the law, however, and, therefore, did not base his opinion on the traditional exception. Instead, he turned to the new conflicts methodologies. He studied the interests of the states concerned and found a false conflict.¹⁵¹

The sole issue presented by the case was which state's law should be chosen for determining damages.¹⁵² Because none of the parties were residents of Illinois, Justice Duncan decided that Illinois had no interest in limiting recovery. Ohio, on the other hand, naturally was concerned with compensation for families of Ohio residents killed in accidents and with administration of Ohio estates.¹⁵³ Therefore, the court had no reason to apply Illinois

144. 25 Ohio St. 2d 193, 194, 267 N.E.2d 405, 405-06, *cert. denied*, 403 U.S. 931 (1971).

145. *Id.* at 195, 267 N.E.2d at 406.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 196-97, 267 N.E.2d at 407. The other major exceptions to the traditional rules are (a) use of general law when possible, *i.e.*, look at any jurisdiction that would validate a contract on the theory that the trend is toward validation; (b) reference to the intention of the parties, *i.e.*, look at the law that the parties intended to govern the agreement; and (c) characterization of issues, *i.e.*, decide that the issue is procedural, thus governed by *lex fori*, to avoid application of foreign law. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 182-87 (1933).

150. For further explanation of the public policy exception and its use in sample cases, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.6 (2d ed. 1980).

151. 25 Ohio St. 2d 193, 198, 267 N.E.2d 405, 408, *cert. denied*, 403 U.S. 931 (1971). Although Justice Duncan cited Justice Traynor's article, Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959), for the true-false conflict dichotomy, this part of the decision clearly was also attributable to the teachings of Currie. See *supra* text accompanying notes 48-61.

152. 25 Ohio St. 2d 193, 195, 267 N.E.2d 405, 405, *cert. denied*, 403 U.S. 931 (1971).

153. *Id.* at 198, 267 N.E.2d at 408. Note that the administration of the estate was not related to the question of the amount of damages allowable and would not have been relevant to interest analysis. See *supra* text accompanying notes 43-47.

law but every reason to apply Ohio law. This analysis generally follows the approach of interest analysis and specifically that of Currie.¹⁵⁴ Although the inquiry normally would have ended at this point, Justice Duncan, in dicta, outlined a process for resolving true conflicts. He suggested a "substantial state interest" test.¹⁵⁵

Justice Leach's concurrence was supported by two of the justices who had also concurred with Justice Duncan and by one who had not.¹⁵⁶ It demonstrates a more conservative attitude toward choice of law. While Justice Leach agreed that the court should not apply *lex loci* automatically, he protested abandonment of this rule. Instead, he suggested that *Fox* merely carved out an exception to the traditional approach.¹⁵⁷ Justice Leach characterized the modern trend as a "most significant contact" test¹⁵⁸ and warned of the uncertainty and confusion that application of modern theories would cause.¹⁵⁹

Fox was a positive development in Ohio law; Ohio courts finally had attempted to deal with new conflicts methodologies. *Fox* was a failure, however, because the court did not address the issues adequately. Rather than surveying options other than *lex loci delicti* and providing a choice based on sound reasoning, the *Fox* opinions drastically altered the law without providing sufficient basis in the sources of the major new choice-of-law trends.¹⁶⁰ The case apparently was decided with only a vague awareness by most members of the court of developments in the field.

The Duncan opinion invites misinterpretation. In one crucial sentence the justice wrote: "[I]n such a case the automatic application of the rule of *lex loci delicti* must be abandoned."¹⁶¹ Strong language such as "must be abandoned" seems to indicate radical change. Upon closer inspection, however, one realizes that its meaning is emasculated by the modifiers "in such a case" and "automatic." Thus, it is impossible to divine the author's position. Indeed, the differing conclusions of subsequent cases demonstrate the problematic nature of the *Fox* decision. And although the Leach concurrence accurately predicted much of the confusion that followed *Fox*, it made no attempt to avoid this consequence.

154. See *supra* text accompanying notes 48-61. Despite the abundance of legal authority in this field, Justice Duncan cited neither Currie nor any other source of modern choice-of-law theories.

155. 25 Ohio St. 2d 193, 199, 267 N.E.2d 405, 408, *cert. denied*, 403 U.S. 931 (1971). Again, Justice Duncan did not mention the source of this approach, nor did he elaborate on its meaning.

156. *Id.* at 202, 267 N.E.2d at 410 (Leach, J., concurring).

157. *Id.*

158. This apparently is a cross between a "grouping of contacts" approach, which originated in the case of *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), and the "most significant relationship" test of the *Second Restatement*, see *supra* text accompanying notes 62-77.

159. 25 Ohio St. 2d 193, 202, 267 N.E.2d 405, 410 (Leach, J., concurring), *cert. denied*, 403 U.S. 931 (1971).

160. Schneider, *Lex Loci Delicti: A Dying Choice of Law Approach in Ohio Tort Cases*, 32 OHIO ST. L.J. 790, 813 (1971).

161. 25 Ohio St. 2d 193, 195, 267 N.E.2d 405, 406, *cert. denied*, 403 U.S. 931 (1971). It is in this portion of the opinion that Duncan outlined the major shortcomings of *lex loci delicti* and drew the conclusion that Ohio law should be changed. The language quoted is the principal statement of this holding.

B. *The Aftermath of Fox*

Even though the *Fox* decision adopted modern conflicts methodologies, it left a void in Ohio law. In *Fox* the Ohio Supreme Court seemed to indicate a new direction for Ohio choice of law. It failed, however, to provide specific instructions to guide future decisions. The court suggested that the true-false conflict dichotomy was crucial,¹⁶² but did not say when a court should invoke that distinction. Justice Duncan implied that a specific test existed to resolve true conflicts, but he mentioned neither the details of the test nor the mechanics of its application.¹⁶³ Furthermore, the majority opinion does not clarify whether public policy should be discarded as an exception to *lex loci* or whether the public policy doctrine exists alongside modern methodologies.

Although an excellent survey of Ohio conflicts law, published shortly after the *Fox* decision, suggested that the *Second Restatement* should be adopted, this advice either escaped the attention of Ohio courts or went unheeded.¹⁶⁴ In general, although later decisions parallel *Fox* in their use of interest analysis as a tool to resolve choice-of-law issues, the later opinions do not employ any specific theory or analytical approach. Rather, subsequent decisions demonstrate a crude balancing of some interests and provide language that justifies the courts' use of *lex loci delicti*.¹⁶⁵ The decisions subsequent to *Fox* show a decided lack of consistency, with the possible exception of some consensus on the broadest level of analysis.

1. *Schiltz v. Meyer—Fox Modified*

*Schiltz v. Meyer*¹⁶⁶ followed *Fox* by approximately one year. In *Schiltz* a Kentucky resident sued another Kentucky resident in an Ohio court for injuries sustained in an accident that had occurred in Ohio. The Ohio Supreme Court found that both the substantive and the procedural law of Ohio governed the cause of action.¹⁶⁷ While the court agreed that it should not apply *lex loci* automatically, the Leach concurrence was cited as the controlling authority, rather than the majority opinion in *Fox*. Because *Fox* had rejected the use of the law of the place of injury, the *Schiltz* court explained why it reached a different conclusion. It first mentioned the importance of public policy in *Fox*.¹⁶⁸ The *Schiltz* court also noted the absence of Illinois interests in that case.¹⁶⁹ Essentially, the *Schiltz* opinion said that *Fox* had presented no compelling reason for the application of Illinois law. In distinguishing that situa-

162. *Id.* at 198, 267 N.E.2d at 408.

163. *Id.*

164. Schneider, *Lex Loci Delicti: A Dying Choice of Law Approach in Ohio Tort Cases*, 32 OHIO ST. L.J. 790 (1971).

165. See *infra* text accompanying notes 234-39.

166. 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972).

167. *Id.*

168. See *supra* text accompanying notes 149-51.

169. See *supra* text accompanying note 153.

tion from *Schiltz*, the Ohio Supreme Court stated that plaintiff's choice of an Ohio court

increased our governmental interest beyond that of merely being the state in which the accident occurred. We now have the additional interest of advancing, in our courts, those policies which our General Assembly has seen fit to maintain in this area of tort law. Until such time as the General Assembly amends or repeals our guest statute, we are bound to apply it in cases before our courts wherein the accident occurred in Ohio.¹⁷⁰

The decision firmly stated that when a nonresident chooses an Ohio court in which to sue another nonresident for damages due to an automobile accident, Ohio will apply its own law in the litigation.¹⁷¹

Although the *Schiltz* court paid lip service to interest analysis, it retreated to the traditional approach to conflicts law. Not only was the result identical to that which would have been obtained had the court employed pure *lex loci delicti*, but the interests of the other state concerned were not even mentioned. Furthermore, the only state concern that was considered, Ohio's interest as the plaintiff's choice of forum, is not a legitimate governmental interest under modern theories.¹⁷² A preference for the law of the forum could be justified under the Currie approach, but Currie uses *lex fori* only after interest analysis has failed to resolve the conflict.¹⁷³ Although the court cited Leflar earlier in the opinion,¹⁷⁴ thus implying that it had adopted his approach, the result in *Schiltz* is inconsistent with Leflar's theories. Indeed, in explaining the fourth choice-influencing consideration—advancement of the forum's governmental interests—Leflar suggested that a *Schiltz*-style analysis would misapply this consideration.¹⁷⁵

It is interesting to note that in the same year that *Schiltz* was decided the Ohio Supreme Court rejected the use of modern analysis in an intestate succession case. The Lucas County Court of Appeals had utilized governmental interest, in an analysis styled after Leflar, to reach a nontraditional result. This methodology was rejected on appeal.¹⁷⁶

2. Moats v. Metropolitan Bank

In *Moats v. Metropolitan Bank*,¹⁷⁷ which followed *Schiltz*, the Ohio Supreme Court again rejected the application of *lex loci*. The conflict arose when two Ohio residents were killed in an airplane crash in Pennsylvania. One estate sued the other, and the personal representatives of both decedents

170. 29 Ohio St. 2d 169, 172, 280 N.E.2d 925, 927 (1972).

171. *Id.* at 172, 280 N.E.2d at 927.

172. See *supra* text accompanying notes 43-47 & 162-65.

173. See *supra* text accompanying notes 48-61.

174. 29 Ohio St. 2d 169, 171, 280 N.E.2d 925, 926 (1972).

175. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 291 (1966).

176. *Howard v. Reynolds*, 30 Ohio St. 2d 214, 283 N.E.2d 629 (1972).

177. 40 Ohio St. 2d 47, 319 N.E.2d 603 (1974).

resided in Ohio.¹⁷⁸ Ohio's airplane guest statute precluded plaintiff's recovery; Pennsylvania law permitted it.¹⁷⁹ The *Moats* court cited *Fox* and *Schiltz* in support of its decision not to apply *lex loci delicti* automatically. In *Moats*, as in *Schiltz*, the court distinguished previous inconsistent cases on public policy grounds.¹⁸⁰ Justice Herbert, writing for a unanimous court, found that Pennsylvania had little interest in the litigation because all the contacts were with Ohio. The only event that had occurred outside Ohio was the crash itself. Justice Herbert noted that the court not only considered the interests of each state, but also recognized a duty to respect Ohio's policy as expressed in its guest statute.¹⁸¹ The court held that Pennsylvania's interest could not outweigh Ohio's concerns.¹⁸²

Moats is important in two respects. First, the *Moats* court employed interest analysis, albeit by a somewhat circuitous route. Although the interests clearly weighed in favor of Ohio, Ohio's paramount concern should have been the regulation of guest-host relationships between Ohio residents. The court could have recognized that Ohio had the following legitimate concerns: (1) Protecting an Ohio host from liability to ungrateful guests, (2) protecting the insurers of Ohio citizens from collusive suits, or (3) reducing claims by guests against insurers of Ohio hosts.¹⁸³ These interests were not even mentioned. In addition, an Ohio corporation owned the plane and kept it hangared in the state. These circumstances also may have created legitimate interests. Administration of the estate in Ohio, which was mentioned, did not, however, constitute a legitimate concern.¹⁸⁴ Second, the *Moats* court emphasized public policy. Although policy can be an element in modern analysis, correct application of interest analysis not only demonstrates that the policy exists in a particular state, but also explains why the contacts underlying the cause of action bring that policy into play. Furthermore, one must show that the other states concerned have neither a stronger policy nor a nexus to the occurrence.¹⁸⁵ This application of interest analysis was not performed correctly in *Moats*. Instead, the court, as in previous cases, apparently used public policy in the traditional sense—as an exception to the rule of *lex loci delicti*.

3. THE EFFECT OF SCHILTZ COMBINED WITH MOATS

Interpreted together, *Schiltz* and *Moats* demonstrate that Ohio courts are receptive to the more flexible, modern approaches to choice of law. These cases, however, also show Ohio's continued adherence to the traditional

178. *Id.* at 47, 319 N.E.2d at 603.

179. *Id.* at 47-48, 319 N.E.2d at 603.

180. *Id.* at 49, 319 N.E.2d at 604.

181. *Id.*

182. *Id.*

183. Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1633-34 (1981).

184. Compare *supra* notes 151 and 153 and accompanying text.

185. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 6.1-.8, at 266-77 (2d ed. 1980).

conflicts theories. While both courts agreed that *lex loci* should not be used routinely, they did not follow Justice Duncan's language in *Fox*, which called for a radical departure from the traditional doctrine. Indeed, the *Schiltz* court stubbornly used the traditional rule in a situation in which its application made no sense according to modern theories.¹⁸⁶ Although *Schiltz* contains strong language requiring the application of *lex loci* in similar fact patterns, Ohio's guest statute has since been found unconstitutional.¹⁸⁷ Thus, future courts will easily distinguish this case, and *Schiltz* will not discourage the use of more modern analysis.

C. The Trend of the Early Seventies

An analysis of *Fox*, *Schiltz*, and *Moats* indicates that Ohio law still lacks concrete guidelines for resolution of conflicts issues. A few general trends, however, have emerged. Most important, Ohio law clearly allows departure from the strict application of *lex loci*, and Ohio courts value consideration of state interests. Yet, because of unfamiliarity with current theories, Ohio courts have misapplied modern approaches in previous decisions, and reliance on the reasoning of these cases may be unwarranted. Any argument or decision based on the modern approaches must begin with a thorough analysis of their methodology. Although Ohio courts are receptive to interest analysis, *lex loci delicti* remains a contender in any choice-of-law battle.¹⁸⁸ It is unclear which modern theory Ohio courts endorse, and Ohio attorneys who are uncomfortable using modern methodologies may not rely on these techniques unless a clear injustice is apparent. Thus, Ohio law will have a strong tendency to retain its emphasis on *lex loci*, except in unusual situations.

Finally, a strong thread of public policy considerations runs through all these cases. In *Fox* public policy was listed as an alternative ground for the decision;¹⁸⁹ in *Schiltz* and *Moats* the court held that Ohio's guest statute reflected a strong policy of the Ohio General Assembly¹⁹⁰ and, therefore, was significant to the choice of law. Although it is unclear whether the courts in these cases used public policy in the traditional sense, as an exception to *lex loci delicti*, or misapplied it, as an Ohio interest in the context of interest analysis, public policy is an important consideration in Ohio conflicts law.

D. Federal Court Cases Using Ohio Conflicts Law

Many cases that include choice-of-law issues are tried in the federal courts under diversity jurisdiction. Between 1974 and 1977 federal courts

186. Since both the plaintiff and the defendant were nonresidents, Ohio had no interest in applying its guest statute. Use of Ohio law would neither protect an Ohio host from liability nor reduce Ohio insurance premiums.

187. Ohio's guest statute was found unconstitutional in *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

188. *Ohio Jurisprudence* continues to cite *lex loci delicti* as the general rule in Ohio. 16 OHIO JUR. 3D *Conflict of Laws* § 42 (1979).

189. See *supra* text accompanying note 149.

190. See *supra* text accompanying notes 170 & 179-81.

decided six cases concerning Ohio conflicts rules.¹⁹¹ Although these decisions did not expressly attempt to influence Ohio law, they are considered here for several reasons. First, the federal court cases provide an illuminating interpretation of Ohio decisions. Second, the opinions constitute a large proportion of the total volume of multistate litigation. Third, the lack of clear guidelines in current conflicts law, coupled with the possibility of differing interpretations of Ohio law in state and federal courts, increases the importance of the plaintiff's choice of forum.

1. Case-by-Case Analysis

*In re Silver Bridge Disaster Litigation*¹⁹² was the first conflicts case decided in federal district court after *Fox*. This suit against the United States Government followed the collapse of a bridge connecting Ohio with West Virginia. A large number of persons were either killed or injured.¹⁹³ The court found that Ohio had adopted a form of interest analysis and noted that both states were legitimately concerned with the application of tort liability standards to their own citizens. Nevertheless, the court held that Ohio would have applied its law to the cases in which death occurred on the Ohio portion of the river and would have applied West Virginia law to the others.¹⁹⁴ Thus, although it found interests based on residence, the court's decision rested on the place of death—in essence, the traditional *lex loci delicti* rule.

Kliner v. Weirton Steel,¹⁹⁵ decided in the same year as *Silver Bridge*, was a wrongful death suit resulting from an explosion at a West Virginia construction site. Plaintiff was a resident of Ohio, which allowed unlimited recovery. West Virginia, on the other hand, did not permit full recovery. The court applied West Virginia law.¹⁹⁶ The *Kliner* court noted that it was required to follow the conflicts rules of the state in which it was sitting.¹⁹⁷ According to the district judge, Ohio had adopted a flexible approach to choice of law and its courts had tempered *lex loci* with an "evaluation of competing governmental interests."¹⁹⁸ The court studied the concerns of each state. Ohio possessed an interest in compensating resident tort victims; West Virginia was concerned with the standard of care governing contractors in that state. Because the court found that the interests were equal, it adhered to the traditional *lex loci delicti*.¹⁹⁹ Although the opinion mentions public policy, it

191. *Jones v. Wittenberg Univ.*, 534 F.2d 1203 (6th Cir. 1976); *McCluskey v. Rob San Serv.*, 443 F. Supp. 65 (S.D. Ohio 1977); *Michell v. General Motors Corp.*, 439 F. Supp. 24 (N.D. Ohio 1977); *Saalfrank v. O'Daniel*, 390 F. Supp. 45 (N.D. Ohio 1975), *rev'd on other grounds*, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976); *Kliner v. Weirton Steel*, 381 F. Supp. 275 (N.D. Ohio 1974); *In re Silver Bridge Disaster Litig.*, 381 F. Supp. 931 (S.D. W. Va. 1974).

192. 381 F. Supp. 931 (S.D. W. Va. 1974).

193. *Id.* at 934.

194. *Id.* at 946.

195. 381 F. Supp. 275 (N.D. Ohio 1974).

196. *Id.* at 277.

197. *Id.* at 276.

198. *Id.* The court also mentioned a "clear and substantial governmental interest" test. *Id.* at 277.

199. *Id.* at 277.

seems to ignore the determinative role that public policy had played in previous cases. Yet the language in the previous cases indicates that Ohio's strong policy of full compensation would outweigh even West Virginia's concern with the standard of care in *Kliner*.²⁰⁰

*Saalfrank v. O'Daniel*²⁰¹ followed *Kliner* in 1975. In *Saalfrank* the plaintiff, an Indiana resident, was injured by the defendant, an Ohio resident, in an accident that occurred in Ohio. The plaintiff also alleged malpractice against an Indiana hospital that had treated the plaintiff after the accident.²⁰² At issue was the right of the Ohio defendant to either indemnification or contribution from the hospital.²⁰³ Ohio law would have granted the defendant this right; Indiana law was unclear. The court held that Ohio law applied.²⁰⁴ According to the *Saalfrank* court, Ohio's approach was a balancing of interests.²⁰⁵ Apparently, the court was referring to a rough weighing of state concerns. Proceeding to study the relevant interests, the district judge found that Indiana's concerns were too ambiguous to ascertain. In contrast, Ohio's interests were clear: they included shielding Ohio defendants from higher damage verdicts resulting from the negligence of hospitals and supplying Ohio insurance carriers with a standard for measuring their risks for accidents occurring in Ohio.²⁰⁶

The *Saalfrank* court was under the impression that Ohio had abandoned *lex loci delicti*, even though no previous Ohio cases had reached that conclusion.²⁰⁷ Furthermore, while interest analysis obviously played a role in Ohio law at this time, Ohio did not clearly apply any specific kind of modern analysis.²⁰⁸

Jones v. Wittenberg University,²⁰⁹ decided in 1976 by the Sixth Circuit Court of Appeals, arose from the shooting death of a student by a university security guard.²¹⁰ Decedent's estate was being administered in Pennsylvania; Pennsylvania and Ohio allowed different amounts of damages. The *Jones* court applied Ohio substantive law. The court interpreted *Fox* to mean that Ohio no longer used *lex loci*, but instead had instituted interest analysis. Because Ohio was both the place of the wrong and the state of the decedent's residence, the court concluded that Ohio possessed the paramount interest in the calculation of damages.²¹¹ That the plaintiff based the action on the Ohio

200. See *supra* text accompanying note 153.

201. 390 F. Supp. 45 (N.D. Ohio 1975), *rev'd on other grounds*, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976).

202. *Id.* at 47-48.

203. *Id.* at 45-46.

204. *Id.* at 57.

205. *Id.*

206. *Id.*

207. *Id.* The court cited *Fox* and *Schiltz* as authority. *Id.*

208. The only approaches that Ohio courts had mentioned at this time were the substantial governmental interest test (Justice Duncan) and the most significant contacts approach (Justice Leach), both in *Fox*. See *supra* text accompanying notes 155 & 158.

209. 534 F.2d 1203 (6th Cir. 1976).

210. *Id.* at 1206.

211. *Id.* at 1213.

wrongful death statute was a significant factor in the court's decision. The court acknowledged Pennsylvania's interest in the administration of the estate, but found that this interest was outweighed by the strong Ohio concerns.²¹²

In 1977 the federal courts decided several Ohio conflicts cases, including *Michell v. General Motors Corp.*²¹³ This products liability case was based on the allegedly negligent design and manufacture of a child's safety seat. The accident occurred in Canada, plaintiff's domicile. Defendant corporation was located in Michigan, where the seat had been manufactured.²¹⁴ The court dismissed the action on the ground of *forum non conveniens*,²¹⁵ in part because of its determination that under Ohio choice-of-law rules Ontario law would apply. According to the district court, Ohio used "the substantive law of the place of the injury absent compelling governmental interest to the contrary."²¹⁶ The court could not discover any Michigan or Ohio interests that demanded the application of a law other than that of Ontario.²¹⁷

McCluskey v. Rob San Services,²¹⁸ also decided in 1977, was a suit for wrongful death. Decedent and his personal representative were from New York. The accident occurred in Ohio, and the choice-of-law issue concerned a release of liability granted by decedent's estranged wife, a Georgia resident, on behalf of herself and the couple's five children.²¹⁹ Judge Duncan, who had written the *Fox* opinion while on the Supreme Court of Ohio, found another opportunity to address Ohio conflicts law in his *McCluskey* opinion. The opinion reflects the court's confusion over whether it should characterize the release as a contract or as an affirmative defense in tort.²²⁰ The court decided that the release was a tort issue, at least between the wife and the defendants, and held that Ohio law applied.²²¹

The opinion lists alternative grounds for the resolution of each issue. Judge Duncan argued that *lex loci* mandated application of Ohio law to the issue of the release as an affirmative defense against the claims of the wife.²²² Regarding the children, he characterized the issue of the release first as one of contract, then, alternatively, as one of tort. During his discussion of the tort aspects of the release, Judge Duncan cited his own opinion in *Fox* and held

212. *Id.*

213. 439 F. Supp. 24 (N.D. Ohio 1977).

214. *Id.* at 27.

215. *Id.* at 26-27. *Forum non conveniens* is defined broadly as "[t]he doctrine or principle that where, in a broad sense, the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, jurisdiction should be declined and the parties relegated to relief to be sought in another forum." *BALLENTINE'S LAW DICTIONARY* 493 (3d ed. 1969).

216. 439 F. Supp. 24, 27 (N.D. Ohio 1977).

217. *Id.*

218. 443 F. Supp. 65 (S.D. Ohio 1977).

219. *Id.* at 68.

220. *Id.* The problem of characterization is not new to choice of law. It exists under both the traditional and the modern rules because both require an initial determination of which set of rules apply. For a good discussion of this problem, see R. LEFLAR, *AMERICAN CONFLICTS LAW* §§ 87-88 (3d ed. 1977).

221. 443 F. Supp. 65, 68-69 (S.D. Ohio 1977).

222. *Id.* at 68.

that Ohio had adopted the “substantial state governmental interest” test²²³ for choice of law. This assertion directly contradicts his statement earlier in the opinion that *lex loci delicti* was the Ohio rule. Thus, *McCluskey* gave two mutually exclusive renditions of Ohio law. Although the court correctly applied interest analysis and held that Georgia had the more substantial interests in determining whether a mother domiciled in Georgia can bind her minor children,²²⁴ the significance of the application of interest analysis in *McCluskey* is questionable because of the confusing and inconsistent nature of the opinion as a whole.

2. General Trends of Choice of Law in the Federal Courts

In all six of the above cases the federal courts acknowledged the use of modern theories in Ohio. Nevertheless, the courts were influenced greatly by the traditional *lex loci* doctrine. The results of *Silver Bridge*, *Kliner*, *Jones*, and *Michell* were almost identical to those that would have been obtained under pure *lex loci delicti*.²²⁵ In *Saalfrank* the law of the place of the wrong controlled the initial, or primary, tort, while the court used interest analysis to achieve a different result on the secondary negligence issue.²²⁶ Similarly, the court in *McCluskey* decided most of the issues using traditional methodologies, but gave an alternative ground for its decision that used a variation of interest analysis.²²⁷ In addition, every case gave a different interpretation of the specific modern approach allegedly adopted in Ohio.²²⁸

The variety of approaches used by federal courts in interpreting Ohio law leaves counsel considerable flexibility to argue for a particular method of determining and weighing the various interests in Ohio cases. It would be erroneous, however, to conclude that there are no guidelines at all; although

223. *Id.* at 71.

224. *Id.*

225. The following chart illustrates the results of these cases:

<u>case</u>	<u>place of wrong</u>	<u>applicable law</u>	<u>see text accompanying</u>
<i>Silver Bridge</i>	Ohio and West Virginia	Ohio and West Virginia	<i>supra</i> note 194.
<i>Kliner</i>	West Virginia	West Virginia	<i>supra</i> note 199.
<i>Jones</i>	Ohio	Ohio	<i>supra</i> notes 211–12.
<i>Michell</i>	Ontario	Ontario	<i>supra</i> note 216.

226. *See supra* text accompanying notes 204–06.

227. *See supra* text accompanying notes 223–24.

228. Compare the following descriptions of Ohio law:

<u>case</u>	<u>description of Ohio law</u>	<u>see text accompanying</u>
<i>Silver Bridge</i>	form of interest analysis	<i>supra</i> notes 193–94.
<i>Kliner</i>	evaluation of competing interest	<i>supra</i> notes 198–99.
<i>Saalfrank</i>	balancing of interests	<i>supra</i> note 205.
<i>Jones</i>	interest analysis	<i>supra</i> note 211.
<i>Michell</i>	<i>lex loci</i> absent compelling governmental interest to the contrary	<i>supra</i> note 216.
<i>McCluskey</i>	<i>lex loci delicti</i> substantial state governmental interest	<i>supra</i> note 222. <i>supra</i> note 223.

no two interpretations of Ohio law are identical, some areas of general similarity are apparent. All descriptions of Ohio law contain a broad, flexible study of the interests of the states concerned. And although no definite formula emerges for identifying and ranking state concerns, all the opinions recognize that the Ohio approach includes some balancing of interests, albeit crude and sometimes biased. Furthermore, one observes a strong trend toward applying the law of the place of injury, regardless of whether this result is couched in terms of traditional or modern theories.

E. *Ohio Choice of Law in the Eighties*

After the *Moats* opinion a lull occurred in Ohio choice-of-law decisions. This silence was broken in late 1980 with *Bonkowsky v. Bonkowsky*.²²⁹ An Ohio resident sued her husband, also domiciled in Ohio, for injuries resulting from an automobile accident in Vermont. Although Vermont law would have allowed recovery and the insurance policy did not bar the claim, Ohio adhered to the doctrine of interspousal immunity.²³⁰ The trial court had refused to apply the law of Vermont, the place of injury.²³¹ The plaintiff alleged that the trial court had erred in failing to follow *lex loci delicti* and that the claim should not have been barred.²³² On appeal the Cuyahoga County Court of Appeals affirmed the lower court.²³³

The appellate court began its reasoning by noting Ohio's consistent adherence to the doctrine of interspousal immunity.²³⁴ It then held that *lex loci* had been abandoned in Ohio and that Ohio now used a more modern approach.²³⁵ The court reasoned that Ohio "has rejected the 'rote application of *lex loci delicti*' where considerations of public policy should accompany the judicial resolution of conflicts between the laws of other states."²³⁶ The court determined that Ohio had a clear, strong policy against negligence actions between spouses. It characterized the place of the accident as fortuitous, suggesting that the location was of only secondary importance in the decision. Because Ohio possessed a "paramount, continuing interest"²³⁷ in the couple's relationship, the court found that Ohio's policy took precedence over the interest of Vermont.²³⁸ Therefore, the plaintiff could not recover damages.²³⁹

229. 19 Ohio Op. 3d 113 (Ct. App. 1980), *aff'd*, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert. denied*, 102 S. Ct. 2963 (1982).

230. The leading Ohio cases upholding interspousal immunity are *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978), and *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

231. 19 Ohio Op. 3d 113, 113 (Ct. App. 1980).

232. *Id.*

233. *Id.* at 114.

234. *Id.* at 113.

235. *Id.* at 114.

236. *Id.*

237. *Id.* The court cited RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

238. 19 Ohio Op. 3d 113, 114 (Ct. App. 1980).

239. *Id.* This is the type of situation in which Leflar would call for a decision based on the better rule of law. See *supra* text accompanying notes 85-87. For example, Minnesota, a state that views Leflar's theory favor-

Unlike previous decisions, the *Bonkowsky* opinion demonstrates an awareness of modern theories in choice of law and thus makes an important contribution to Ohio conflicts law. Although the court's opinion does not outline a formula for ascertaining and weighing interests in Ohio cases, it does cite authority for modern conflicts theory: the court specifically mentioned the *Second Restatement* as the proper method of modern analysis. The opinion seems to rely heavily on section 6, which lists very general considerations for all choice-of-law decisions.²⁴⁰ Section 146, the rule that creates a presumption of *lex loci*, is not mentioned. This endorsement of the *Second Restatement* approach²⁴¹ clarifies the direction in which Ohio has embarked and provides a reference point for future litigation.

The *Bonkowsky* case is significant because it also represents a continuation of the emphasis on public policy seen in earlier cases.²⁴² When future litigation involves a strong Ohio public policy such as interspousal immunity, this concern likely will weigh heavily in a choice-of-law decision. Although Ohio courts often have failed to articulate public policy in terms of governmental interests, policy frequently is analyzed in the same manner as interest analysis. The courts perceive public policy as a strong Ohio interest, one which either mandates that the courts invoke the traditional exception to *lex loci* or tips the balance in favor of Ohio law under modern approaches. In cases demonstrating strong inclinations toward the application of *lex loci delicti*, public policy will appear in its traditional role as an exception to that rule. In other instances, when the traditional rule produces an unjust result, policy more likely will constitute a strong Ohio interest. One should not assume, however, that *lex loci* will be abandoned in the near future in favor of interest analysis; it is an old rule and may suffer from lack of flexibility, but nevertheless retains considerable vitality.

A study of Ohio conflicts cases from the last decade, then, has revealed recurring themes. A gradual decrease in exclusive reliance on the traditional tort rule has been accompanied by a gradual increase in the importance of new choice-of-law theories. The important, if somewhat ambiguous, role played by public policy has become apparent.

A survey of the recent developments in Ohio conflicts law would be incomplete, however, without any mention of what is lacking. Certain aspects of the choice-of-law revolution have not affected Ohio. First, the courts have not mentioned the Currie methodology specifically, even though his true-false

ably, refused to apply Ontario's guest statute in a case concerning two Ontario residents who had been in an accident in Minnesota. The court believed that its own law permitting recovery was wiser. *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

240. See *supra* text accompanying notes 63-69.

241. *Bonkowsky v. Bonkowsky*, 19 Ohio Op. 3d 113, 114 (Ct. App. 1980), *aff'd*, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert. denied*, 102 S. Ct. 2963 (1982). See also *Young v. That Was the Week That Was*, 312 F. Supp. 1337, 1339 (N.D. Ohio 1969), *aff'd*, 423 F.2d 265 (6th Cir. 1970).

242. See *supra* text accompanying notes 189-90.

conflicts dichotomy has been employed.²⁴³ Some courts have found that the forum possesses interests by virtue of being the place where the plaintiffs chose to sue;²⁴⁴ their analyses were vague, however, and may not have been an articulation of Currie's preference for *lex fori*. The *Bonkowsky* court mentioned Leflar's choice-influencing considerations, but rejected application of the better rule of law even though counsel specifically argued that interspousal immunity was outdated.²⁴⁵ Courts have followed both Leflar's theory and the *Second Restatement* because each incorporates the very flexible, general principles of modern choice-of-law theory and presents relevant considerations for a conflicts decision.²⁴⁶ Ohio does not appear to have embraced the third and most rigid tier of the *Second Restatement* rules, however, because in those cases in which traditional rules were considered important, courts have had the opportunity to resort to the first *Restatement*. In addition, unlike some other states, Ohio has failed to exhibit any significant bias toward residents.²⁴⁷ Similarly, proplaintiff and prorecovery tendencies are absent.²⁴⁸

V. CONCLUSION

Conflict of laws is not an easy field. Furthermore, since the percentage of all cases that concern conflicts issues is small, an attorney has little opportunity to become familiar with choice-of-law methodology and little incentive to stay abreast of modern developments. The lack of consensus in choice of law generally, and in Ohio specifically, compounds these problems. Consequently, courts often have decided multistate causes of action without adequately considering the available theories and the various methods for choosing between competing law. The inconsistency, ambiguity, and vagueness of Ohio opinions in the last fifteen years illustrate this phenomenon. While no single correct method exists for choosing the law to govern multistate litigation, legal commentary on the subject is sufficient to enable Ohio courts to make logical choices among the various possibilities.

Over ten years ago one scholar suggested that the Ohio courts explicitly adopt the approach of the *Second Restatement*.²⁴⁹ This suggestion is even

243. See *supra* note 53 and accompanying text. This approach was employed in *Fox v. Morrison Motor Freight*, 25 Ohio St. 2d 193, 267 N.E.2d 405, cert. denied, 403 U.S. 931 (1971).

244. See, e.g., *supra* text accompanying notes 166-71.

245. The court insisted on applying Ohio's outdated interspousal immunity. See *supra* text accompanying note 234.

246. See *supra* text accompanying notes 174 & 62-79.

247. For a thorough discussion of the ramifications of the parties' domiciles on a choice-of-law discussion, as well as illustrative cases, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 2.1-.16 (2d ed. 1980).

248. *Id.* § 6.4. Again, Weintraub provides excellent commentary on the trend toward recovery in tort cases.

249. Schneider, *Lex Loci Delicti: A Dying Choice of Law Approach in Ohio Tort Cases*, 32 OHIO ST. L.J. 790 (1971).

more appropriate today. The *Second Restatement*'s analysis would allow courts the flexibility to decide individual cases justly, but would provide judges with the opportunity to use more traditional rules when appropriate. This approach would transform Ohio's emphasis on public policy into a governmental interest. Public policy would not lose its importance in Ohio law, but would continue to play a significant role in future decisions. Adoption of the *Second Restatement* will not resolve all future conflicts issues automatically; it will go far, however, toward transforming the labyrinth of Ohio law into a comprehensible set of legal principles.

Sonja M. Haller